

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LESLIE BRIGGS, as next friend)
of T.W. and B.S.; EVAN WATSON,)
as next friend of C.R.; and,)
HENRY A. MEYER, III, as next)
friend of A.M., for themselves)
and for others similarly situated,)

Plaintiffs,)

v.)

Case No. 23-cv-81-GKF-JFJ

ALLIE FRIESEN, in her official)
capacity as Commissioner of the)
Oklahoma Department of Mental)
Health and Substance Abuse)
Services; and DEBBIE MORAN, in)
her official capacity as Interim)
Executive Director of the Oklahoma)
Forensic Center,)

Defendants.)

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE GREGORY K. FRIZZELL

UNITED STATES DISTRICT JUDGE

AUGUST 15, 2024

REPORTED BY:

BRIAN P. NEIL, RMR-CRR
United States Court Reporter

A P P E A R A N C E S

Frederic Dorwart, Paul DeMuro, and David W. Leimbach,
Attorneys at Law, Frederic Dorwart Lawyers, 124 East 4th
Street, Tulsa, Oklahoma, 74103, attorneys on behalf of the
Plaintiffs;

Nicholas Southerland, Attorney at Law, Oklahoma
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Gentner F. Drummond, Attorney General, Office of
Oklahoma Attorney General, 313 N.E. 21st Street, Oklahoma City,
Oklahoma, 73105, attorney on behalf of the Defendants.

Thursday, August 15, 2024

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DEPUTY COURT CLERK: This is Case No.

23-CV-081-GKF-JFJ, Leslie Briggs, et al., v. Allie Friesen, et al. Counsel, please state your appearances for the record.

MR. DEMURO: May it please the court, Your Honor,

Paul DeMuro, David Leimbach, Fred Dorwart, and Nick Southerland on behalf of the plaintiffs. And we also have one of the named plaintiffs, Hank Meyer, here. Leslie Briggs, the named

plaintiff -- the lead named plaintiff was intending to here.

She's got COVID so she's not here. We also have in attendance Dr. Lauren Kois who was one of our consultants who submitted the declaration in support of our supplement. And that's our team, Your Honor.

THE COURT: Good morning.

MR. DRUMMOND: Morning. Gentner Drummond on behalf of the state.

THE COURT: Good morning. I don't believe after looking at the submissions by the parties here that we need to spend any time this morning, unless you believe it's necessary, with regard to the Rule 23(a) and (b)(2) factors.

Any disagreement? I can make those findings, I think, at the outset.

MR. DEMURO: Mr. Leimbach was going to handle that.

MR. LEIMBACH: Your Honor, no disagreement. I think

1 we set forth the position in the parties' papers.

2 **THE COURT:** All right. I think that will get us to
3 what the real issues -- or at least the issues that I'm
4 concerned with are.

5 So the court finds, based upon the parties' submissions
6 and for purposes only of preliminary approval, that the Rule
7 23(a) factors are met. Specifically, the class is so numerous
8 that joinder of all members is impracticable, the numerosity
9 factor; that there are questions of law or fact common to the
10 class, the commonality factor; that the claims or defenses of
11 the representative parties are typical of the claims or
12 defenses of the class, the typicality factor; and that the
13 representative parties will be fairly and adequately
14 protected -- or will fairly and adequately protect the
15 interests of the class.

16 In addition, the court finds that the Rule 23(b)(2)
17 factor is met here. The defendants' conduct is generally
18 applicable to all class members; that is, a systemic failure in
19 Oklahoma's competency restoration system through the department
20 and OFC's failure to provide timely competency restoration
21 treatment. Further, the proposed consent decree adequately
22 addresses the class as a whole and it is unnecessary to
23 differentiate between class members.

24 Thus, the requirements of Rule 23(b)(2) are satisfied
25 and this factor weighs in favor of preliminary certification.

1 Now, the court's main concerns here -- and I know you
2 all need to meet the standard of whether the court will likely
3 be able to approve the proposed settlement. I just wanted to
4 alert you to the things that I believe are the most important
5 with regard to that which has been presented.

6 First of all, as it relates to Rule 23(e)'s requirement
7 of adequacy, whether Section 1175.6a permits outpatient
8 restorative treatment, that's something that you need to
9 address.

10 Secondly, as it relates to the Rule 23(e) factor
11 regarding the effectiveness of the proposed method of
12 distributing relief to the class, whether the time frames for
13 decreasing maximum allowable wait times are reasonable.

14 And then third -- and this is a small matter -- but we
15 also need to discuss the Rule 23(e) factor relating to class
16 notice of the terms of any proposed award of attorney fees. I
17 don't find that the fees requested are unreasonable at all. I
18 simply believe that Rule 54, as Newberg on Class Actions
19 states, that the notice requires that a motion for attorney
20 fees state the amount sought. So I think that's a technical
21 matter.

22 Also, it strikes me that with regard to notice to
23 unknown future class members, if we get that far, I happen to
24 be on a list of e-mail recipients to OBA criminal law section
25 members, and it would seem to me that that's an easy notice

1 group to include with regard to unknown future class members.

2 So Mr. DeMuro.

3 **MR. DEMURO:** Yes, Your Honor. May I have one second
4 to bring up the statute in question?

5 May it please the court, the competency restoration
6 statute, Your Honor, allows the department -- or requires the
7 department to take custody of class members who are declared
8 incompetent and it specifically allows designees,
9 quote/unquote, designees to provide treatment.

10 **THE COURT:** Yes. But in that case, the statute says
11 specifically in which case custody of the person shall be
12 transferred to the department. It doesn't -- it doesn't refer
13 to outpatient treatment.

14 **MR. DEMURO:** So our position, Your Honor, is like in
15 other instances in state court criminal proceedings, that a
16 community placement can be done with the technical overlay of
17 custody. In other words --

18 **THE COURT:** So you're saying it's merely legal
19 custody?

20 **MR. DEMURO:** That's absolutely correct.

21 **THE COURT:** So how can a person that is under
22 Oklahoma statutes determined to be "dangerous" be released
23 under 1175.6a?

24 **MR. DEMURO:** Well, I don't -- two points on that.
25 Competency doesn't involve a finding of dangerousness. It

1 just --

2 **THE COURT:** No, no, no. The statute defines these
3 people as dangerous under -- what is the statute? -- 1-103.
4 They are dangerous.

5 **MR. DEMURO:** Well, the --

6 **THE COURT:** Well, it's not 1-103. Just a second.
7 Let me get -- this is a spider's web of statutes here.

8 Well, I apparently don't have the statute in front of
9 me determining dangerousness. You probably know it by heart
10 having spent two years looking -- oh, here we go. 22 O.S.
11 Section 1175.1. Dangerous means a person who is a person
12 requiring treatment as defined in Section 1-103 of Title 43A of
13 the Oklahoma statutes.

14 **MR. DEMURO:** Yes. And that's not a person --
15 respectfully that is not a person who's been declared
16 incompetent. A Title 43 commitment is completely different
17 than a competency finding of incompetency.

18 The only requirement in the same statute that you're
19 citing, Your Honor, 1175.1, it also defines "incompetent" and
20 "competency." Subsection (4) of that statute, incompetent
21 person means the present inability of a person arrested for or
22 charged with a crime to understand the nature of the charges
23 and proceeding brought against him or her and to effectively
24 and rationally assist in his or her defense.

25 So the way this breaks out, Your Honor, is it's

1 possible a person who is incompetent is also deemed and
2 declared by the state court upon proper showing to be a Title
3 43A dangerous -- to be dangerous, but that is not a component
4 of these class members. Incompetent defendants are not
5 defendants who are declared dangerous and --

6 **THE COURT:** Now, wait. You're going to have to walk
7 me through this. Because 1175.6a specifically references in
8 the first sentence Section 1-103 of the Title 43A of the
9 Oklahoma statutes. As you know, 1-103 has the five different
10 categories of persons requiring treatment, and then 1175.1 says
11 that dangerous means a person who is a person requiring
12 treatment as defined in Section 1-103 of Title 43A of the
13 Oklahoma statutes.

14 So how can you ignore 1175.1 and the definition of
15 "dangerous" if to be found incompetent prior to conviction
16 1175.6a explicitly says that because he or she is a person
17 requiring treatment as defined in Section 1-103 of Title 43A of
18 the Oklahoma statutes?

19 I'm not disputing with you that there may be people who
20 are incompetent who are not dangerous but you and I are tied to
21 the statutes here. The Oklahoma statutes say that anyone who
22 is a person requiring treatment under 1-103 of Title 43A is
23 dangerous.

24 **MR. DEMURO:** Well, that's not how the statute is
25 interpreted in the state courts, Your Honor.

1 **THE COURT:** Well, but --

2 **MR. DEMURO:** And --

3 **THE COURT:** -- I'm not bound by practice, am I? I'm
4 bound by the statute.

5 **MR. DEMURO:** I don't disagree with that. Let me get
6 back to the point.

7 I think if you break out the person requirement
8 treatment statute, you have to look at the definition of what
9 an incompetent person is and it doesn't require a finding of
10 being dangerous. So I think there's an ambiguity in the
11 statute.

12 **THE COURT:** I don't think it's ambiguous at all.
13 Because a person requiring treatment is defined in 43A, 1-103,
14 and Section 1175.1 says that dangerous means a person who is a
15 person requiring treatment. Now, you and I can differ or you
16 and I can both disagree as a matter of policy but that's what
17 the statute says.

18 **MR. DEMURO:** So let me jump to another point, and
19 that is the consent decree in the community -- in this
20 community placement pilot program makes a specific finding
21 that -- has a specific provision in it that says only the
22 people who are deemed to be not dangerous are eligible for that
23 placement.

24 **THE COURT:** Yeah. But how can we -- how can we
25 ignore the statute?

1 **MR. DEMURO:** Well, I'm not ignoring the statute.
2 It's just read differently by the courts. And if you look, for
3 example, at the orders of the --

4 **THE COURT:** Well, I would suggest to you that if
5 that's true, it's ignored by the courts, the very Oklahoma
6 statutes that we've just been discussing. Because I'll agree
7 with you that there is a statute -- let me see if I can find it
8 here -- 1175.7 that says that persons incompetent but capable
9 of achieving competency within a reasonable time can receive
10 treatment by medical supervisors. But subsection (b) of that
11 statute says that those services have to be paid from court
12 funds.

13 And alternatively, subsection (d) says the person -- or
14 the court may allow the person to receive treatment from
15 private facilities, if such facilities are willing, and neither
16 the state nor the court fund is required to directly pay for
17 such care. But those individuals under 1175.7 are not persons
18 requiring treatment under Section 1-103.

19 **MR. DEMURO:** So, Judge, respectfully I do think in
20 that regard the statute is ambiguous and has to be construed in
21 the manner in which it's been applied across the state. The
22 courts -- if you look at some of the -- if you look at the
23 transfer orders, the orders requiring treatment, there's not a
24 finding that these people are dangerous. There's just a
25 finding that they're incompetent and subject to the custody of

1 the department because of that.

2 In addition, the consent decree, Your Honor, I'm fairly
3 certain, if we turn to that provision if your concern is about
4 the community -- the pilot community-based restoration program,
5 it excludes -- it has very narrow requirements.

6 **THE COURT:** I understand. I've read the consent
7 decree. I just can't approve a consent decree that violates
8 Oklahoma law and you and I can urge the legislature to change
9 the statutes. But I'm telling you you need to explain to me
10 how I can possibly read these statutes to allow outpatient
11 treatment under 1176 -- once again, this is a mess of statutes
12 -- 1175.6a.

13 **MR. DEMURO:** What I -- Your Honor, what I would
14 propose is the following.

15 We didn't anticipate you raising this issue. If we
16 could jump to the other issues that Your Honor is concerned and
17 maybe we could take a break and I could confer with our team.
18 I respect the court's work in looking --

19 **THE COURT:** I may be wrong, I mean, but you need to
20 explain to me because I can't violate state law or supersede --
21 or impose my policy preference and at the same time violate the
22 statutory scheme.

23 **MR. DEMURO:** Well, see, I think that if you look at
24 the law as applied -- the consent decree as applied, if you
25 entered this consent decree, you would not be violating state

1 law because there would be no -- there would be no person who
2 was --

3 **THE COURT:** The consent decree can't supersede the
4 state law.

5 **MR. DEMURO:** Well, the consent decree in operation
6 would not violate state law because it's not placing people who
7 are dangerous in the community. So it's not going to end up --

8 **THE COURT:** Who need outpatient treatment.

9 **MR. DEMURO:** Right. So it wouldn't --

10 **THE COURT:** And they would be in the community. In
11 fact, you called them community-based restoration programs.

12 **MR. DEMURO:** Correct. But I think the consent
13 decree has a specific finding that the -- or specific provision
14 that the only people who are qualified for that program are
15 people that the court and the district attorney agree are not a
16 risk -- are not a risk to harm -- are not dangerous and a risk
17 to harm people.

18 **THE COURT:** Well, I mean, that may be a rational way
19 to approach it. I'm just saying that's contrary to the
20 statutes. Because the statute says -- again, the first line --
21 that if the person is -- if the person is found to be
22 incompetent prior to conviction because he or she is a person
23 requiring treatment, as defined in Section 1-103 of Title 43A,
24 and because the Oklahoma statutes tell me that a person
25 requiring treatment is dangerous, then it says that the court

1 shall suspend the criminal proceedings and order the Department
2 of Mental Health and Substance Abuse Services to provide
3 treatment, therapy, or training, and it says the court shall
4 further order the department to take custody --

5 **MR. DEMURO:** Right.

6 **THE COURT:** -- of the individual as soon as a
7 forensic bed becomes available.

8 Then the next paragraph does say that the department
9 can designate a designee of the department to provide
10 restoration -- competency restoration services, in which case
11 custody of the person shall be transferred to the department.

12 I'm trying to understand how custody can somehow
13 transmogrify into outpatient treatment services. I'm not
14 saying it's a bad idea. I'm just saying it's not consistent
15 with Oklahoma law as I read it unless you persuade me
16 otherwise.

17 **MR. DEMURO:** Well, like I said, Judge, I'd be
18 repeating the same arguments that I already made and I don't
19 want to do that. What I suggest is that we go through the
20 other points, we take a break, I can confer with my team, and
21 we can come back.

22 **THE COURT:** Sure.

23 **MR. DEMURO:** I can also tell with you great
24 confidence that when a person is declared incompetent, the
25 state courts do not make findings -- are not required to and do

1 not -- unless they're also a danger and they get committed
2 under Title 43, incompetent defendants are not practically in
3 the statement treated as -- dependent on a finding of
4 dangerousness or risk.

5 **THE COURT:** Well, there are other incompetents under
6 that because of -- what is it? -- intellectual disabilities --

7 **MR. DEMURO:** Sure.

8 **THE COURT:** -- that are not within your class;
9 correct?

10 **MR. DEMURO:** That is correct, absolutely. This is a
11 pretty narrow class.

12 **THE COURT:** They're not dangerous; right?

13 **MR. DEMURO:** Well, they could be dangerous in other
14 settings. There are persons requiring treatment under Title 43
15 who don't necessarily -- they're not overlapping always Venn
16 diagrams. There's persons who are requiring treatment who may
17 or may not be incompetent and there are incompetent people who
18 may or may not be a harm -- a risk of harm to the public. Each
19 case is a case-by-case determination.

20 **THE COURT:** But your concern in this class action is
21 people who are being held in jail currently. They're not being
22 released by these judges. So --

23 **MR. DEMURO:** Correct.

24 **THE COURT:** -- they are, as a practical matter,
25 dangerous. They've been determined to be dangerous because

1 they're in custody; right?

2 **MR. DEMURO:** No.

3 **THE COURT:** So you're talking about people who have
4 been released that are in the community, they're part of your
5 class?

6 **MR. DEMURO:** No. What part that I disagree with
7 Your Honor, is -- let's take it a step at a time.

8 Pretrial detainees are not as a status declared
9 dangerous. I mean, there's a whole host of reasons why
10 pretrial detainees are in jail. They can't make bond. It's
11 not because they're dangerous.

12 **THE COURT:** But we're only talking about those
13 who --

14 **MR. DEMURO:** Who are declared incompetent.

15 **THE COURT:** Correct.

16 **MR. DEMURO:** Right. I'm just taking it a step at a
17 time. You become a pretrial detainee not because you're
18 dangerous, but because in general you can't make bond or you've
19 got a no-bond condition, and then somebody files a motion and
20 says that we think this individual is incompetent, can't
21 understand the nature of the proceedings and assist with the
22 defense.

23 There's no requirement in these court orders -- the
24 courts aren't asked to find that incompetent people are also
25 dangerous. The reason they're being held is because they're

1 not -- because under the statute once a person is declared
2 incompetent, the statute requires -- and so does due process --
3 the criminal case ceases because an incompetent person is not
4 competent to make decisions about the criminal case.

5 So the cessation of the criminal proceedings is not
6 contingent on a finding of dangerous. It's contingent upon a
7 finding of incompetency which is a different concept. The
8 statute as it's written in this way that has caused Your Honor
9 concern is ambiguous in that regard, but the practice is not
10 ambiguous and it's been done, as I've described, in state
11 courts.

12 So when you look at the commitment orders from the
13 state court to the department, they don't make a finding that
14 -- it doesn't require a finding that the person is dangerous.
15 It just -- and from a practical standpoint, Judge, the
16 department -- when someone's committed to the department's care
17 because they're incompetent, the department is not asked to
18 treat them to become not dangerous, to treat them medically so
19 that they no longer are a risk to themselves or others. That's
20 not part of competency restoration treatment. Competency
21 restoration treatment is very narrow.

22 So it would be, in my view, an impractical, unworkable
23 reading of the statute to suggest that the department has to
24 treat people who are declared incompetent as if they were
25 dangerous because they're not providing -- the statute doesn't

1 require them to -- the department to provide such treatment.
2 All the department is required to do is provide competency
3 restoration treatment, which is not geared towards restoring a
4 person who is unsafe or a threat to themselves or others.

5 Does that make sense?

6 **THE COURT:** Well, once again, I'm looking at
7 43A-1-103 and the five categories of persons requiring
8 treatment, which all of your class satisfy; correct? All of
9 your class are persons requiring treatment; right?

10 **MR. DEMURO:** All of -- no, not as -- not as you've
11 just structured the statutes. All of our class members are not
12 people that have been declared unfit or unsafe or --

13 **THE COURT:** No, no, no, no. My question is, under
14 1175.6a, the first sentence again, if a person is found to be
15 incompetent prior to conviction because he or she is a person
16 requiring treatment as defined in Section 1-103 of Title 43A,
17 then you look at the definition of person requiring treatment
18 under 43A-1-103 and it talks about people who pose a
19 substantial risk of immediate physical harm to another person
20 or persons as manifested by evidence of violent behavior
21 directed toward another person or persons.

22 **MR. DEMURO:** Right.

23 **THE COURT:** Has placed another person or persons in
24 a reasonable fear of violent behavior directed towards such
25 person or persons or serious physical harm to them as

1 manifested by serious and immediate threats. And then there's
2 self-harm described in subsection (1), subsection (4), and
3 subsection (5).

4 **MR. DEMURO:** So may I direct your attention to the
5 competency restoration statute that we started out with,
6 1175.6a?

7 **THE COURT:** Right. That's what I was looking at.

8 **MR. DEMURO:** And so I understand that it has that
9 reference but let's follow this through.

10 The statute also says in the second paragraph that the
11 person shall remain in the custody of the county jail until
12 such time as the department has a bed available unless
13 competency restoration services are provided by a designee.
14 Goes on to say that if found competent by the court, the
15 criminal proceedings shall be --

16 **THE COURT:** Where are you now?

17 **MR. DEMURO:** I am in subsection --

18 **THE COURT:** (c)(2)?

19 **MR. DEMURO:** Yes.

20 **THE COURT:** Or --

21 **MR. DEMURO:** Yes. Subsection (c).

22 **THE COURT:** All right.

23 **MR. DEMURO:** So if the person is determined by the
24 Department of Mental Health or Substance Abuse Services or
25 designee to have regained competency -- are you following me,

1 Your Honor?

2 **THE COURT:** Yeah.

3 **MR. DEMURO:** Okay.

4 **THE COURT:** Then a hearing shall be scheduled within
5 20 days.

6 **MR. DEMURO:** No. Or is no longer incompetent
7 because the person is a person requiring treatment as defined
8 by Title 43A, a hearing shall be scheduled within 20 days.

9 So this statute itself makes a distinction between
10 incompetent people, people who are incompetent but restored to
11 competency, and folks who are people requiring treatment.

12 **THE COURT:** I understand. But under (c), that's the
13 procedural mechanism to get that person back in front of the
14 court so that the court can determine whether the person is
15 competent.

16 **MR. DEMURO:** Exactly.

17 **THE COURT:** So it says that a hearing shall be
18 scheduled within 20 days, that doesn't say that within those 20
19 days you're entitled to outpatient treatment. In fact, the
20 premise is that DMH or the designee has decided that the person
21 has regained competency. So maybe let's move on to another
22 subject and you can discuss this and we'll come back to it.

23 So with regard to maximum allowable wait times --

24 **MR. DEMURO:** Yes. Yeah, Your Honor. This is
25 something that was negotiated heavily. We believe that the

1 time frames are more than reasonable for the department to
2 achieve for the following reasons.

3 First, the sheer length of time. The final metric for
4 compliance of the 21-day ultimate target date is not for 17
5 months after final approval of the consent decree, which if all
6 things go well for us, still won't be another month or two
7 away. So you're talking about a year and a half for the
8 department to get down to the 21 days.

9 We've worked with our experts to develop this target as
10 being a meaningful target. The evidence that we've submitted
11 to you in the form of our experts' affidavits have opined that
12 this is an achievable goal within those time frames, and these
13 are experts who have experience in both the administration of
14 competency restoration programs as state administrators and as
15 well as federal court monitors and consultants. Moreover, the
16 department's own consultant has also blessed these time frames
17 as being achievable.

18 The first -- I'll point out that the first time frame,
19 which is 60 days maximum allowable wait time, does not take
20 effect until seven months, Your Honor, after final approval.
21 And given what we think we know now about where the wait times
22 are now, that's not ambitious, that's not an ambitious time
23 frame, it's a very reasonable time frame.

24 So we think we've submitted enough evidence in the form
25 of expert affidavits to confirm that this is an achievable

1 metric and the time frames are very reasonable.

2 **THE COURT:** Now, any idea why the Alabama consent
3 decree contemplated a timetable of 24 months?

4 **MR. DEMURO:** Every system is different. You know,
5 Alabama had its own unique challenges subject to negotiations.
6 I'm not sure if the Alabama system -- what the condition of the
7 Alabama system was compared to the Oklahoma system, how
8 egregious that was.

9 Dr. Kois is in the courtroom. She may be able to
10 answer those questions, if Your Honor wants to dive into that.
11 We relied on our experts to tell us what was -- to inform us as
12 to what was meaningful, had the Attorney General's team's input
13 based on their consultation with the department.

14 So, you know, each system is different, has its own
15 unique issues and problems. These are the time frames that
16 we've been advised both by the Attorney General's Office and by
17 our collective experts are very achievable.

18 **THE COURT:** All right. I mean, it does appear that
19 the consent decree as a practical matter contemplates more than
20 16 months to achieve the 21-day maximum allowable wait time; is
21 that right?

22 **MR. DEMURO:** Yeah. No later than 16, yes. I
23 misspoke. Not 17. Sixteen months after final entry.

24 And I'll make a further point, Your Honor. We
25 presented this consent decree to the department in December of

1 2023, and it's our understanding, based on our work with the
2 Attorney General's Office, that the department has already
3 begun to try to improve its systems and start to work towards
4 this plan. These are not -- this plan is not a mystery. It's
5 not as if the department's first seeing it today. They've seen
6 it for months. They are working -- hopefully working towards
7 this goal already. So in actuality, you know, this train has
8 left the station in terms of what the department is doing for
9 months and months before this.

10 The court's going to have to hold a hearing on final
11 approval, which will be set, you know, a month, 45 days,
12 whatever the court sets, that provides additional time. We
13 base this on the best data that our experts had available to
14 them about comparable systems and what we believe is, you know,
15 a reasonable final goal.

16 **THE COURT:** Well, it strikes me that that satisfies
17 preliminary approval given the 16 months after the consent
18 decree has been entered.

19 I do notice that, of course, Allie Friesen is not here
20 today. I need to ask the Attorney General. There's been
21 chatter as to whether or not she can enter into this decree.
22 Of course, we have the contingency review board.

23 Could I talk to the attorney general about this just
24 quickly?

25 **MR. DEMURO:** Of course. At your pleasure, Your

1 Honor.

2 **THE COURT:** The procedure -- if the court were to
3 preliminarily approve the consent decree, would it make sense
4 to have the final hearing, and if the court were to approve the
5 consent decree after giving notice and allowing opponents to be
6 heard, because of the contingency review board could this court
7 possibly enter the judgment prior to satisfaction of Section
8 200? In other words, either the legislature has to approve
9 this by joint, what, concurrent resolution or two of the three
10 members of the contingency review board have to approve it;
11 right?

12 **MR. DRUMMOND:** Correct. We do think the appropriate
13 protocol is to do the preliminary consent. I've conferred with
14 the Speaker of the House, the Senate Pro Tempore, and the
15 Governor's office on the protocol, and the state is in
16 agreement that we would request the court to enter the
17 preliminary approval subject to legislative approval or the
18 contingency review board.

19 I think that they are seeking a threshold by this
20 court, that the court is satisfied on a threshold basis of the
21 parties' stipulated consent decree. Then with that, with the
22 parties' agreement and the court's preliminary approval, then
23 proceed with the formal approval in the --

24 **THE COURT:** So you would contemplate the approval by
25 the contingency review board prior to the court entering

1 judgment?

2 MR. DRUMMOND: Yes.

3 THE COURT: Okay.

4 MR. DRUMMOND: That would be the request of the
5 parties.

6 THE COURT: All right. And with respect to the
7 fines here, having been at the Tax Commission and been around
8 these people who do state budgeting, how would the fines be
9 paid? Apparently they're paid out of the Department of Mental
10 Health's budget, but then the Department of Mental Health has a
11 role in deciding how those fine monies are paid?

12 MR. DRUMMOND: Yeah. That would be levied against
13 the Department of Mental Health.

14 THE COURT: Okay. Out of what? Would they have to
15 take it out of other budgets?

16 MR. DRUMMOND: Well, we actually funded -- and I'm
17 sorry. I've done so many budget numbers, but I want to say a
18 million-six specifically for interim fees and costs associated
19 with this consent decree.

20 THE COURT: All right.

21 MR. DRUMMOND: So the legislature is well aware that
22 it will need to effectively add an appropriation consistent
23 with the findings in the consent decree.

24 THE COURT: And the consent decree has caps?

25 MR. DRUMMOND: Yes.

1 **THE COURT:** So it's not a blank check?

2 **MR. DRUMMOND:** Correct. If the mental health
3 department performs -- you know, this is a stick and a carrot;
4 right?

5 **THE COURT:** Right.

6 **MR. DRUMMOND:** I mean, the predecessor to The
7 Commissioner Friesen was a believer that nobody suffered mental
8 health and, you know, she played the shell game and she was
9 asked to retire. Now she's gone on to some bigger and greater
10 opportunity.

11 But Commissioner Friesen understands and recognizes the
12 deficiency in the restorative services process and began in
13 earnest in February with implementation of plans to modify the
14 behavior of the mental health department so that we can get in
15 compliance.

16 **THE COURT:** Right. My next question is way down
17 into the weeds because the consent decree allows any monies
18 that are collected as fines to be paid for the benefit of a
19 certain class of mentally incompetent people, including the
20 members of this class. The word "including" jumped out at me
21 because, as a lawyer, if the class members here are the
22 beneficiaries of this consent decree, why should this court
23 allow those fine monies to be paid for anyone other than class
24 members of this class?

25 **MR. DRUMMOND:** I think the court is correct. I

1 think the "including" didn't strike me the same way as it
2 strikes you. That's wordsmith that we can certainly alter.
3 The intent is that it benefits this class and future class
4 members in the restorative services.

5 **THE COURT:** Arguably, I suppose it could benefit
6 future class -- people who may become future class members, but
7 I think it has to be more tethered to class members or people
8 once they -- who are not yet class members, once they are class
9 members, if you follow me.

10 **MR. DRUMMOND:** That's the intent of that language.
11 So I see the ambiguity that you call out.

12 **THE COURT:** It's not a big point.

13 **MR. DRUMMOND:** Right. But it is -- the intent is
14 and in practice those fines and fees will benefit this class
15 and future class members.

16 **THE COURT:** Okay.

17 **MR. DRUMMOND:** The whole objective is to get
18 restorative services right. Because right now we are failing
19 on the due process of these defendants and we're, frankly,
20 impugning and injuring public safety and law enforcement. So
21 we just need to get together and do the right thing.

22 **THE COURT:** So there's no question in your mind that
23 this is violative of substantive due process rights of those in
24 the class?

25 **MR. DRUMMOND:** Yes.

1 **THE COURT:** All right. Thank you very much.

2 **MR. DRUMMOND:** Certainly.

3 **THE COURT:** Mr. DeMuro, maybe you could address that
4 "including" question that I have. As a lawyer, I think I could
5 answer that for you but it jumped out at me for some reason.

6 **MR. DEMURO:** Could you restate the question, Your
7 Honor?

8 **THE COURT:** Yes, sir. Let's see --

9 **MR. DEMURO:** I had a hard time hearing over there.

10 **THE COURT:** Yes, sir. Yeah, it's a little difficult
11 to hear in this courtroom. Let me see if I can find that.

12 **MR. DEMURO:** Is it related to the fines provision,
13 Your Honor?

14 **THE COURT:** Yes, sir. Just one second. Let me see
15 if I can find it.

16 **MR. DEMURO:** Those start at paragraph 93.

17 *(Discussion held off the record)*

18 **THE COURT:** Okay. It's paragraph 94 on page 35.

19 **MR. DEMURO:** Yes, Your Honor, I have it.

20 **THE COURT:** And the very top line. It says that the
21 funds in the fines account must be used for the purpose of
22 funding or supporting services for people experiencing mental
23 illness and competency issues in Oklahoma who are charged with
24 criminal charges, including the class members -- so, once
25 again, that jumps out at me as being not exclusively for the

1 class members -- in which the department is not otherwise
2 obligated to provide by law or under this consent decree.

3 So as I say, that's not a big deal but it's kind of a
4 lawyerly question.

5 **MR. DEMURO:** Well, the intent of the fine provision,
6 Your Honor, was -- obviously it's a central component of the
7 decree. It's the enforcement mechanism. It's the
8 carrot-and-stick. So it's indispensable to the consent decree,
9 the fines in general.

10 **THE COURT:** Right.

11 **MR. DEMURO:** The use of the fines, we want the fines
12 to be an incentive to the department but we don't want the --
13 we also want the fines to be used to further the department's
14 mission. But we didn't want the fines to be some circulating
15 fine where the department would willingly get a fine just to
16 recirculate the same money in things that they're already
17 otherwise obligated to do.

18 We wanted the fines to be sort of used -- not sort of
19 -- we want the fines to be used at the discretion of this fines
20 committee, which includes the department, who could see needs
21 within the department that may need additional funding and
22 address those needs. That could be the forensic competency
23 restoration system. It could be other of the department's
24 missions depending, in the discretion of this fines committee,
25 on where those funds are best needed.

1 **THE COURT:** So you agree it's not limited to
2 benefiting this class?

3 **MR. DEMURO:** I agree, yes. It is conceivable that
4 under -- that the fines committee could dispense funds to the
5 benefit of people who technically aren't members of the class.
6 I think that's a fair reading. It says including, not
7 exclusively.

8 **THE COURT:** Sure.

9 **MR. DEMURO:** And the way that that benefits the
10 class -- because I can see Your Honor's mind at work -- is the
11 fines provision is central to this, and so the operation of the
12 fines provision benefits the class by incentivizing compliance.
13 That's how this whole fine provision works.

14 **THE COURT:** All right.

15 **MR. DEMURO:** Does that make sense, Your Honor?

16 **THE COURT:** It does. You could see why I asked the
17 question. I mean, because arguably the consent decree is
18 working to benefit the class and the fines don't necessarily
19 have to go back to benefit this particular class because
20 they're benefited by the imposition of the fines themselves.

21 **MR. DEMURO:** Correct.

22 **THE COURT:** Right. Let's go back here then. I
23 touched upon the attorney fees briefly. Once again, that's a
24 fairly technical aspect of it here.

25 As I say, Newberg on Class Actions suggests that notice

1 should comply with Rule 54 which requires in part that a motion
2 for attorney fees state the amount sought. I think your
3 proposed notice just says -- and this is true -- you say the
4 consent decree requires that the department pay class counsel
5 reasonable attorney fees which class counsel has substantially
6 discounted. I know it's your practice to do that in these
7 types of matters, ones that have come before me.

8 But I do think it's necessary to state the amount in
9 that notice because, you know, it's fair game. If somebody
10 wants to oppose it, that's fine. You know, a lot of -- I've
11 got a lot of attorney fee disputes here so I'm used to it.

12 **MR. DEMURO:** Yeah. I've been party to some of
13 those, Your Honor. So we have no problem -- I'd have to look
14 back at the notice and see what our precise language is
15 regarding attorney fees. But I agree with your general
16 premise, that the notice ought to tell class members with as
17 much specificity as is possible at that time what our fees are.

18 **THE COURT:** I think so.

19 **MR. DEMURO:** I have no problem with that at all.
20 We'd be happy to amend the notice to specifically put in the
21 amount and how the attorney fees work.

22 **THE COURT:** All right. Do you have a prepared
23 presentation of those things you think you need to touch upon
24 to satisfy the record here with regard to adequacy of the
25 consent decree?

1 **MR. DEMURO:** Adequacy of the consent decree?

2 **THE COURT:** Yes, sir.

3 **MR. DEMURO:** In terms of the relief to the class?

4 **THE COURT:** Well, of course, there are a number of
5 factors with regard to adequacy. Just one second here.

6 I think the first requirement, adequacy of
7 representation, is clearly met. You may want to touch on
8 negotiation at arm's length, adequate relief. I think it's
9 clear here that the proposal treats class members equitably
10 relative to each other.

11 So with that, I'd be open to hear any presentation
12 you'd like to make.

13 **MR. DEMURO:** Sure, Your Honor. I appreciate that
14 guidance, Your Honor.

15 I was first approached to consider this case a couple
16 years ago by the Chief Public Defender of Tulsa County, and we
17 had a healthy dose of skepticism taking on something like this,
18 as you might imagine. We reached out to our network of -- I
19 say "our" -- the network of nonprofits that work in this space
20 that we have the good fortune to work with. And as we got into
21 this, we discovered that not only was there a terrible problem
22 in Oklahoma, but it was nationwide and Oklahoma doesn't stand
23 out as an outlier, post-COVID, increase in mental health. We
24 also were very sensitive to some of the things that our local
25 sheriff was saying about his county jail being a de facto

1 mental health institution.

2 And so as we got into it, we realized this was a
3 nationwide mental health crisis.

4 **THE COURT:** Exacerbated by drug use.

5 **MR. DEMURO:** Drug use, fentanyl, the opioid crisis,
6 COVID, which had its impacts that I think will be studied for
7 years which backlogged the criminal cases which caused strain
8 on the criminal justice system in many, many ways. It had a
9 knock-on effect with competency restoration. It increased
10 mental health indicators, homelessness.

11 I mean, all of the societal problems that we're hearing
12 about impact individuals who get in this situation and we see
13 it every day on our streets. We see these people unfortunately
14 experiencing mental illness who are -- the police have no other
15 option right now. That's the sad thing and that needs to be
16 addressed too because our fine police officers do incredible
17 work.

18 But when they confront a lot of these offenders who are
19 trespassing, who are being a nuisance to business owners, who
20 are committing misdemeanor offenses simply out of a
21 manifestation of their mental illness, they get into the system
22 and we started seeing cases where misdemeanants were declared
23 incompetent and were -- this is statewide -- were being held in
24 county jails longer than their six months' maximum sentence for
25 a misdemeanor before they even got competency restoration, in

1 some cases more than a year, because the local jails didn't
2 have the resources, the department was absolutely dysfunctional
3 and dishonest in its former iteration about what it was doing
4 in the jails.

5 So we came to this firm conviction that this is a
6 serious problem in Oklahoma and that the due process rights of
7 hundreds of people are being violated.

8 **THE COURT:** Is it mainly in the metropolitan areas?

9 **MR. DEMURO:** I would say that it aggregates
10 proportionate to population. Because the drug problems are
11 rural. The opiate problems are rural. Your Honor, I think
12 you've probably seen it, too, if you've traveled around the
13 state. Remarkably, hopelessness is plaguing some of our less
14 populous areas as well. And so I would say that my perception
15 is it's generally proportionate to the population. Counties
16 with lower populations have fewer cases.

17 **THE COURT:** Is it your understanding that David L.
18 Moss is currently housing individuals who have been on the
19 waiting list for over a year?

20 **MR. DEMURO:** Yes, that's my understanding. It's my
21 understanding that there are many months and months. The
22 sheriff -- because of the department's mismanagement of its
23 jail-based restoration program -- so-called jail-based
24 restoration program -- the sheriff's legal counsel advised the
25 department to cease and desist providing those type of

1 services --

2 **THE COURT:** And that was through Family & Children's
3 Services; correct?

4 **MR. DEMURO:** At the time Family & Children's
5 Services was the provider.

6 **THE COURT:** They were the latest provider, as I
7 understand it.

8 **MR. DEMURO:** That is correct, Your Honor.

9 **THE COURT:** And they were merely providing drugs.
10 They were not providing competency restoration, as I understand
11 it; correct?

12 **MR. DEMURO:** At most. Yes, at most. And that's a
13 fine organization, Family & Children's Services.

14 **THE COURT:** Right.

15 **MR. DEMURO:** We are grateful to have them in our
16 community.

17 **THE COURT:** Right.

18 **MR. DEMURO:** But the department was incapable of
19 putting forward both the administrative and medical
20 infrastructure to have in-jail restoration and also there were
21 financial conditions. The bottom line is, there is no in-jail
22 restoration going on in Tulsa County as we speak. What the
23 department claims is in-jail restoration in Oklahoma County is
24 a farce. We've got a marriage counselor leading the program
25 who pulls down restoration -- so-called restoration curriculum

1 from Google and has absolutely no training.

2 So what we found was shocking. We found under the
3 prior administration that -- literally shocking that lawyers --
4 the department's internal lawyers were manipulating the wait
5 list, not because of clinical reasons, but they were jumping --

6 **THE COURT:** Jump-frogging?

7 **MR. DEMURO:** Leapfrogging people over the defendants
8 who had the audacity in their criminal cases to file motions
9 for contempt because they had been sitting in county jails for
10 so long waiting competency restoration services when the state
11 court had ordered them to do it consistent with the statute.

12 What we were seeing was those people were getting
13 leapfrogged over and they somehow immediately find a bed, which
14 is, if you step back and think about it, that is an egregious,
15 callous management of a mental health problem. It has no
16 relationship to the clinical needs, the forensic needs of these
17 defendants and was simply designed to avoid judicial scrutiny
18 of the competency restoration system. It was a shell game, a
19 pure and simple shell game.

20 And instead of admitting the problem -- and to be fair
21 to the department, there's a problem. This influx of mental
22 health cases into our system, the criminal justice system,
23 caused this backlog. We don't have enough forensic beds and so
24 it caused this tremendous backlog and wait list. That's the
25 problem.

1 **THE COURT:** How many beds are there at Vinita?

2 **MR. DEMURO:** I think there is 256 but they're not
3 all dedicated to the competency restoration. And there's going
4 to be 80 more beds brought online, forensic beds, and so
5 there's some movement in that area.

6 But another key factor from our perspective, Your
7 Honor, is when we speak to the district attorneys and the
8 sheriffs, and judges, state court judges, I've not heard any
9 feedback that did not confirm that in their counties this was a
10 major problem, that they wanted this consent decree to be
11 passed, they wanted the department to be held to task on their
12 obligation, and that they saw the department as failing in
13 their obligation to provide timely competency restoration
14 services to these defendants.

15 And so when we started, you know, seeing all this,
16 getting our arms around the data, and then also recognizing it
17 was a national problem, we broadened our research, looked at
18 all of the other cases across the country that we could get our
19 hands on, hired the best experts in the country in terms of
20 their experience -- I mean, our experts, Judge, they have
21 academic experience, they're professors at prestigious
22 institution, they have administrative experience, they've been
23 administrators in state court systems, competency systems,
24 they've been in one instance a federal court monitor for
25 similar plan, consultants across the country. We put together

1 what we believe is -- this goes to the point of adequacy -- a
2 state-of-the-art program.

3 **THE COURT:** Have you attempted to determine the
4 number of individuals at any one time -- and I know it's a
5 dynamic or it's a moving number -- but what capacity does the
6 State of Oklahoma need for restoration of competency treatment,
7 whether it's inpatient or outpatient?

8 **MR. DEMURO:** So that's a great point and we had a
9 the lot of discussion on that.

10 There are some studies that we've talked to our experts
11 that correlate population size to how many forensic beds you
12 would need, but that research isn't uniform and it's subject to
13 local variances and populations around the country and
14 characteristics but there is some data on that.

15 And what our plan has done -- initially we had proposed
16 a number of beds that we wanted the department to bring online.
17 We were convinced that the better approach was to -- because of
18 the characteristics I just mentioned -- was to give the
19 department a period of time, 90 days, to confer with the
20 consultants who are national experts and come up with the
21 capacity requirements once the consultants had better
22 visibility into the department's program.

23 So we did have a number to begin with. We thought the
24 wiser course was to let the department and the consultants work
25 together and come up with those capacity numbers.

1 We also think -- I mean, it's community-based
2 restoration and Your Honor has raised some interesting
3 questions about it. This is working in other states. There
4 are a number of -- a profile of these defendants who are not
5 dangerous who haven't committed serious violent crimes who are
6 probably going to be better able to be restored more quickly in
7 a less restrictive environment, a community environment, where
8 they can maintain their relationships with their family and the
9 community. So that piece is something that needs to be brought
10 online. The department was actually considering a
11 community-based program -- rolling out a community-based
12 program, just never got it online. So that's part of the
13 metrics as well.

14 So, Your Honor, what we tried to do is, in consultation
15 with our experts, put together those components of the plans
16 from our jurisdictions that seem to be working and modify them
17 to Oklahoma's needs. And we're here today jointly -- the
18 parties are here jointly together so -- which is, by the way, a
19 testament to the leadership of Attorney General -- I truly
20 believe that -- to see the problem.

21 After initially taking a defensive posture in the case,
22 an aggressive posture in the case -- this goes to arm's length
23 negotiations -- he engaged his team to undertake a review of
24 what was going on at the department and came to the same
25 conclusion we did. I think that takes guts and leadership and

1 that's why we're here now instead of at a trial, because the
2 violations are occurring and we're going to remediate them one
3 way or the other. But our intent, Judge, was to fashion the
4 best plan we could taking pieces from other states that seem to
5 work. It's working in Colorado. It's working in California.
6 It's starting to work in Alabama.

7 So we believe we've crafted in sum a state-of-the-art
8 plan that's tailored to Oklahoma that gives the district
9 attorneys and the department and the courts some flexibility
10 and the consultants to work with all of the stakeholders to
11 come up with the granular ingredients of, for example, the
12 capacity of the number of beds to make a plan that works.

13 Hopefully, we can develop some of these solutions --
14 community-based restoration; pilot program in jail;
15 restoration, if that works -- that is going to alleviate this
16 serious problem. Judge, I have every confidence that if this
17 plan is put into place, it will work and we will be a model for
18 the rest of the country, every confidence in that.

19 **THE COURT:** So this goes back to the original
20 discussions we had, but under 1175.6a, are you suggesting that
21 currently whenever a designee is appointed by the Department of
22 Mental Health, that the Department of Mental Health itself
23 makes a determination as to whether that person is dangerous?

24 **MR. DEMURO:** Yes.

25 **THE COURT:** Or are you saying that a state court

1 judge then makes that determination?

2 **MR. DEMURO:** So what occurs, Your Honor, when --
3 it's the former. A qualified forensic examiner of the
4 department, or the department's designee, will undertake a
5 competency evaluation and make that determination and then that
6 report is submitted to the state court. Typically, the state
7 court -- the typical route, Your Honor, is that once the
8 department's psychologist or a qualified forensic examiner
9 issues their competency report and makes those findings, the
10 report is not contested and it's generally entered as a matter
11 of agreement.

12 Now, of course, you have a right to a competency
13 restoration -- competency trial.

14 **THE COURT:** Right.

15 **MR. DEMURO:** Those are very rare, very, very rare.
16 And so the court will receive the report and accept the report.

17 Now, if the report makes a finding that the person is
18 in need of treatment under the title that you just -- under the
19 statute that you just cited, but the court's order committing
20 the person to the OFC, or the department's custody, typically
21 does not have that as a finding but the court does receive the
22 restoration report.

23 **THE COURT:** But if the state court -- and during my
24 ten years as a state court judge, I never had this type of
25 docket -- but if a state court judge determines somebody to be

1 a person requiring treatment and then, in my reading under the
2 Oklahoma law, therefore dangerous, you're saying that a branch
3 of the executive who has been given the custody of that person
4 can unilaterally decide to put that person in outpatient
5 treatment?

6 **MR. DEMURO:** Well, I'm not sure about the
7 unilateral. I think if I went back to the plan, this would
8 have to be something that the court, the state court, approves.
9 There are instances where folks have to be -- who are committed
10 for civil commitments under Title 43 or persons requiring
11 treatment and they're in the criminal system are moved from
12 treatment facility to treatment facility with the state court's
13 leave. I mean, they'll go to the state court's --

14 **THE COURT:** But, I mean, in those cases, that's
15 in-custody treatment; right?

16 **MR. DEMURO:** Yes.

17 **THE COURT:** I mean, it's inpatient treatment. It's
18 not outpatient treatment.

19 **MR. DEMURO:** It's inpatient, but it could be at a
20 private inpatient facility.

21 **THE COURT:** Well, that's fine. But I'm just
22 wondering, just in terms of the law, if a judge has made the
23 determination that the person is a person requiring treatment,
24 and therefore, dangerous, how can an executive agency then
25 essentially countermand that or order outpatient treatment? I

1 mean, wouldn't they have to go back to the judge and make the
2 case, hey, Judge, this person isn't dangerous, right, can't we
3 do this by outpatient treatment?

4 **MR. DEMURO:** I see the logic. I would have -- I'd
5 have to revisit the terms of the consent decree specifically on
6 this, but I wouldn't have --

7 **THE COURT:** I'm just asking under current practice,
8 not the consent decree. So anyway, I'll give you a chance to
9 talk to your folks.

10 **MR. DEMURO:** Well, yeah, under current practice,
11 it's not happening, at least with the incompetent -- with the
12 incompetency population. I mean, the community-based
13 restoration program is envisioned to be a pilot program. It's
14 something new.

15 **THE COURT:** No, I understand. But I thought you
16 said that currently the Department of Mental Health can
17 designate a third party and that third-party provider can be an
18 outpatient provider. Is that not what you said?

19 **MR. DEMURO:** If I said that, I misspoke.

20 **THE COURT:** Okay.

21 **MR. DEMURO:** Yeah.

22 **THE COURT:** So it's all inpatient so they are truly
23 in custody of the designee?

24 **MR. DEMURO:** Correct. In my understanding, correct.
25 And, of course, there's a wide range of circumstances --

1 **THE COURT:** So what you need to do is show me how
2 outpatient treatment can occur under this statute because I
3 can't amend the statute.

4 **MR. DEMURO:** Right.

5 **THE COURT:** So and my reading may be wrong. So
6 you'll need to educated me as to that.

7 **MR. DEMURO:** Certainly. And, again, I can come back
8 to -- and I said we'd like to take a break and huddle up on
9 that and get the wisdom of my group.

10 **THE COURT:** Right.

11 **MR. DEMURO:** But we're talking about my view of the
12 statute being legal custody, not necessarily physical custody.

13 **THE COURT:** Okay. And do you know of any authority
14 for that proposition?

15 **MR. DEMURO:** I do not.

16 **THE COURT:** Any decisions?

17 **MR. DEMURO:** I'm unaware of any state court
18 decisions on that point.

19 **THE COURT:** All right. Anything else before you
20 huddle up?

21 **MR. DEMURO:** May I confer?

22 **THE COURT:** Yes, sir.

23 *(Discussion held off the record)*

24 **MR. DRUMMOND:** Will the court wish to hear from the
25 state on those adequacy issues or are you satisfied?

1 **THE COURT:** No, I'd be pleased.

2 **MR. DRUMMOND:** No. Whatever the pleasure of the
3 court. I'm happy -- for purposes of the record, I'm happy to
4 speak as to the process that we went through. It might
5 complete -- make the --

6 **THE COURT:** You're welcome to. You've studied this
7 far longer and wrestled with this obviously.

8 I'd to hear about -- in terms of the arm's length
9 negotiation, Mr. DeMuro talks about how the state initially
10 resisted this vehemently, and I'd like to hear that here for
11 the record.

12 Because, of course, you've got other consent decrees
13 that have been criticized nationwide. There's a book called
14 "Democracy by Decree" whereby agencies essentially leverage
15 more funds through the legislature via consent decree, and I
16 want to make sure that the record is clear that that's not
17 what's going on here. Go ahead.

18 **MR. DEMURO:** Yeah. I'll accede the floor because I
19 definitely want to hear the Attorney General's comments on
20 that.

21 But Mr. Leimbach reminded me to point the court to
22 paragraph 68 that the community-based restoration treatment
23 pilot program is only applicable to class members who have been
24 judicially determined not to be a substantial risk of harm to
25 themselves and others.

1 **THE COURT:** Determined by whom?

2 **MR. DEMURO:** Judicially determined. And so I would
3 -- I would -- the intent of that is clearly the state court
4 determine that they not be a substantial risk of harm, which
5 obviously implies that we would -- in the instance of a
6 community-based restoration treatment placement, you would be
7 back in front of the state court judge saying, Your Honor,
8 we're getting ready to -- we have -- of course, the district
9 attorney has to approve, first and foremost, that this person
10 is eligible. You'd be back in front of the judge saying,
11 Judge, the district attorney and the defense counsel believe
12 this person is a candidate for this pilot program. We need to
13 ask you, Your Honor, to make this judicial determination.

14 **THE COURT:** All right. Well, that's wise. My
15 question, though, is, by this decree, are we amending the law?

16 **MR. DEMURO:** And we'll huddle up. My final point of
17 that is, if you read the statute, the 1175.6a, it has these
18 waterfalls of if a person is declared incompetent for reasons
19 other than being a person in need of treatment, and then it
20 goes on.

21 So there, it's clear that the statute contemplates that
22 folks that are declared incompetent are not necessarily people
23 who are in need of persons requiring treatment because there's
24 a classification -- there's several classifications further on
25 in the statute of if people are declared incompetent who are

1 not persons in need of treatment.

2 **THE COURT:** Well, but then that rolls you over to
3 different statutes.

4 **MR. DEMURO:** Sure.

5 **THE COURT:** 1175.6b and 1175.6c, and all we're
6 dealing with here is 1175.6a.

7 **MR. DEMURO:** The point I'm making, Your Honor, is,
8 it can't be the case that the definition of an incompetent
9 person is a person who is requiring treatment if the statute
10 says if an incompetent person is found to be incompetent but
11 not a person needing -- requiring treatment.

12 **THE COURT:** Well, except that what you're quoting
13 from says -- and I'm looking at (C)(4) and (C)(5) -- it says
14 that if the person is found to be incompetent for reasons other
15 than the person is a person requiring treatment as defined in
16 Title 43A. And then subsection (5) again says that if the
17 person is found to be incompetent for reasons other than the
18 person is a person requiring treatment as defined by Title 43A.

19 What we're dealing with is very different. It's the
20 person found to be incompetent prior to conviction because he
21 or she is a person requiring treatment.

22 **MR. DEMURO:** That's where I have a little bit of an
23 intellectual disagreement. That's the ambiguity I'm speaking
24 of. The first sentence says that an incompetent person is a
25 person requiring treatment. And then further on in the

1 statute, it says that an incompetent -- it basically says if
2 the person is incompetent but for reasons other than a person
3 requiring treatment. Those are -- they can't be read to mean
4 that a person -- that all persons who are incompetent are
5 people requiring treatment defined to be dangerous.

6 What that subsection is that we've been talking about
7 points to is that if the person is declared -- if the reason --
8 if the impediment to the person's competency is that he's not a
9 dangerous person under Title 43 or not intellectually disabled
10 under the other title, then he must be released and the case
11 must be dismissed. So I think there is an ambiguity in the
12 statute with respect to what the initial sentence means.

13 **THE COURT:** Well, with due respect, it seems to me
14 that this statute contemplates the wide range of
15 incompetencies. You know, for instance, (C)(3) talks about
16 incompetency because of intellectual disability. (C)(4) talks
17 about people found incompetent for reasons other than being a
18 person requiring treatment and is also found to be not
19 dangerous. So that's a different category. It specifically
20 says then the court shall issue the appropriate order as set
21 forth in Section 1175.6b, which is another statute which is not
22 encompassed in this class action.

23 You go on to the next subsection. If a person is found
24 to be incompetent for reasons other than the person is a person
25 requiring treatment as defined by Title 43 but is also found to

1 be dangerous, another category. Then the court shall issue the
2 appropriate order under Section 1175.6c, which is not what
3 we're dealing with here. We're dealing with 1175.6a, as I
4 understand it. So there are a wide range of incompetencies and
5 we're dealing with this narrow subset, I think --

6 **MR. DEMURO:** We are.

7 **THE COURT:** -- defined in 1175.6a(A).

8 **MR. DEMURO:** I agree. What I'm suggesting is, how
9 can a person be defined as incompetent by reference to the
10 Title 43 factors but then later on in the statute say if you're
11 declared incompetent for reasons other than the Title 43
12 statutes? Well, we've already determined you're incompetent.
13 So those two things are intentioned, I believe.

14 But I also think, Judge --

15 **THE COURT:** Have you tried to go to the legislature
16 to get it amended?

17 **MR. DEMURO:** And I will certainly sit down because
18 I'm trespassing on the Attorney General's time. But my final
19 comment, Your Honor, on that before we huddle up is, as applied
20 with the judicial -- the requirement that these candidates for
21 community-based restoration must be judicially approved or
22 judicially vetted once again to not be dangerous, I think as
23 applied it doesn't violate state law.

24 **THE COURT:** Well, it's clearly rational. But we may
25 need to give you time to brief this narrow issue that we've

1 been discussing.

2 General.

3 **MR. DEMURO:** Thank you.

4 **MR. DRUMMOND:** May it please the court, some
5 preliminary comments and then I want to address the three
6 points that you raised in the adequacy factors.

7 But my office did, as counsel identified, we approached
8 this complaint from a traditional defense posture. As a matter
9 of fact, we filed a motion to dismiss even. But as we began
10 the preliminary investigation into the complaint's core
11 allegations, we became concerned that the plaintiffs' due
12 process claims had merit and that the state's competency
13 restoration system was constitutionally deficient. That's the
14 conclusion independent of plaintiffs' allegations but based on
15 our own independent research.

16 Over the course of the next 18 months, as explained in
17 our joint papers, my office conducted extensive due diligence
18 jointly with the plaintiffs and independently with our own
19 team. We met with stakeholders all across the state and this
20 led to our strong conviction that the state's competency
21 restoration system is chronically and seriously broken and that
22 the plaintiffs were very likely to succeed on their due process
23 claims.

24 Once we realized the magnitude of this problem and the
25 likelihood that the state was violating the constitutional

1 rights of the class members, we began to focus on crafting a
2 solution internal to the mental health department with great
3 resistance and subsequently with more cooperation with the
4 change of leadership and the awareness of the deficiencies.

5 **THE COURT:** So you started this lawsuit with the
6 previous head?

7 **MR. DRUMMOND:** Yes. And met with great resistance
8 and, frankly, misrepresentations and deceit that drove my
9 recommendation that she be terminated or retire. Now, what
10 impact that had, I can't speak. But she ultimately did resign
11 her position and then opened the path through which we could in
12 good faith negotiate with the mental health department.

13 And I don't want to understate the initial acrimony
14 between my office and the mental health department. It was
15 very difficult in convincing the mental health department that
16 there's a substantive due process standard and that they were
17 well below it. But we have been successful in this process.

18 The plan in the consent decree has broad support of law
19 enforcement, judges, and prosecutors across the state. In
20 addition to providing the relief of the class members, the
21 consent decree will enhance public safety by expediting
22 criminal cases and relieving the burden of county jails who are
23 currently, frankly, de facto mental health facilities.

24 The plan was developed with consultants and in support
25 with national subject-matter experts, including experts

1 selected by the Department of Mental Health, and these are the
2 consultants that are referenced in the consent decree. The
3 plan's components have proven to be effective in reducing wait
4 times in other jurisdictions and we believe steadfastly that
5 the plan will work.

6 We believe that the plan as presented to the court is
7 the best solution for Oklahoma and the department and it will
8 save the state the agony and financial burden of adversarial
9 litigation that will only delay a likely inevitable result of
10 an adverse judgment against the state. In other words, we are
11 guilty and it is my objective to control the crash.

12 This has been vetted with state legislators who have
13 anxiety about any consent decree, that it might go into
14 perpetuity. But with that as a backdrop, we negotiated at
15 arm's length with --

16 **THE COURT:** And this has a five-year termination?

17 **MR. DRUMMOND:** Yes, it does.

18 To see the evolution of the plan would be enlightening
19 to this court in that we began on polar-opposite sides, and we
20 have now fashioned a solution that I believe -- that I
21 steadfastly believe is in the best interest of the state.

22 I do want to address your 1175.6a concern. As a
23 predicate matter, all of these individuals in the class have
24 committed a crime, allegedly committed a crime; therefore, they
25 are criminal defendants and then they have been determined by

1 the state court that they are incompetent.

2 And beginning with the premise that the court is at
3 with they're dangerous, we know that on the continuum of
4 restorative services they go from incompetent and dangerous to
5 either never restored, in which case they go to the forensic
6 center, or restored, meaning not dangerous. So there's a
7 continuum.

8 It is my reading of the consent decree that all are
9 arrested and confined and then determined incompetent even
10 using your definition of "dangerous" --

11 **THE COURT:** Well, but it's not mine. It's not my
12 definition. It's the statutory definition.

13 **MR. DRUMMOND:** As you have indicated in the
14 language.

15 But in the process of the restoration services that
16 begin in the jail, we believe there will not be an occasion
17 where a dangerous individual is released to outpatient
18 services. So they begin --

19 **THE COURT:** Because there's a protection within the
20 consent decree?

21 **MR. DRUMMOND:** Right.

22 **THE COURT:** I'm just asking: Is outpatient
23 restoration permissible under the statute?

24 **MR. DRUMMOND:** I believe that it is consistent with
25 the statute, in that beginning with the premise that they're

1 incompetent and dangerous. They are in custody --

2 **THE COURT:** Mr. DeMuro has just admitted that it is
3 not occurring under the current statute, that people are not
4 being referred to outpatient services by designees under the
5 current statute.

6 So am I by this -- or we by this consent decree, if I
7 were to grant it, effectively amending the statute, which I
8 cannot do as a judge. I'm not an elected legislator. I can't
9 do that.

10 **MR. DRUMMOND:** I can appreciate the fact that the
11 court needs additional briefing on this, and I think we will
12 work in joint effort to assuage that issue and make the record
13 clear. But it is my observation that we are consistent with
14 the statute, in that beginning with the criminal defendant, who
15 is deemed incompetent and by definition of the statute
16 dangerous, begins the process toward restorative services and
17 will not be put in an outpatient facility until they are no
18 longer dangerous, incompetent but not dangerous. Because the
19 continuum works them toward the position through which we can
20 then adjudicate them.

21 **THE COURT:** As you know, I see it every day.

22 **MR. DRUMMOND:** Surely.

23 **THE COURT:** Especially with methamphetamine. And
24 once you get somebody off methamphetamine, the mental health
25 situation is better addressed. We have what we call

1 "dual-diagnosis programs" where we can send somebody, and it's
2 very important we get them off the methamphetamine or the
3 fentanyl. And as I say, every day, particularly in the wake of
4 *McGirt*, I am awash in these types of cases.

5 So I understand the continuum. I'm just wondering
6 whether the statute is flexible enough to recognize it because
7 it takes time for a statute to come in line with reality. I
8 mean, the proliferation of drugs in our community is just -- is
9 staggering.

10 **MR. DRUMMOND:** It is. And I think that we need to
11 supplement -- to the extent the court suggests or requires,
12 we'll supplement the brief. And if, in fact, we cannot meet
13 the court's threshold, then I will seek amendment of the
14 legislation. Because I do believe --

15 **THE COURT:** Or this consent decree needs to be
16 purely -- I mean, if my reading is right, then the consent
17 decree needs to mandate inpatient treatment; right? I know it
18 would be more costly; right?

19 **MR. DRUMMOND:** Right. Financially it is not the
20 objective of the state to do that. We do see the value in the
21 outpatient. But, of course, the threshold for the state is, we
22 do not wish to release anybody into an outpatient facility that
23 is not in custody that is dangerous.

24 **THE COURT:** Right.

25 **MR. DRUMMOND:** We don't want that; right?

1 **THE COURT:** Right.

2 **MR. DRUMMOND:** So I think you have the state actor
3 as the protector of the community, but we do believe -- we will
4 address it. I think that we should and will address it to this
5 court's satisfaction.

6 **THE COURT:** I mean, clearly nobody here wants
7 someone released who's dangerous and then commits an act while
8 in an outpatient treatment.

9 **MR. DRUMMOND:** Correct.

10 **THE COURT:** Right.

11 **MR. DRUMMOND:** That would be horrible.

12 Under the 23(b), effectiveness of the relief, we do
13 feel that the time frame -- we have the built-in 16 months to
14 get to the 21 days but we have already begun the process. So
15 mental health began with the threshold of we need at least 24
16 months. Well, in fact, they have now had six months.

17 And so as we -- as this process is grinded to a
18 dissolution, they have begun in good faith that effort. So the
19 plan is being implemented with the current input of the
20 consultants and the current input of the plaintiffs' counsel
21 class. So we have already begun. What we need to do is
22 ultimately memorialize this.

23 And under the class notice and the attorney fees, we
24 believe that the attorney fees expended by the plaintiffs'
25 class counsel is reasonable and -- frankly, I would love

1 comments from the court -- ultimately that it saves the state
2 millions and millions of dollars.

3 **THE COURT:** Right. And it's clearly discounted?

4 **MR. DRUMMOND:** And it's discounted on top of that.

5 **THE COURT:** Right.

6 **MR. DRUMMOND:** With regard to the adequacy factors,
7 we do believe that not all plaintiffs' class counsels are made
8 the same. In this particular instance, what piqued my genuine
9 interest in diving deeper into the complaint was the fact that
10 Fred Dorwart and Paul DeMuro were lead counsel. I know that
11 these men are men of integrity and only champion that, in fact,
12 have deficiencies. So after the initial defensive posture,
13 this Attorney General pivoted toward diving deeper into the
14 allegations that they made. So we believe the adequacy of
15 representation is at the top of the list.

16 We did arm's-length negotiate throughout this process
17 with my litigation team. But it was really a three-way -- the
18 arm was three ways long. I mean, we had mental health pushing
19 back against my office. My office pushing back against
20 plaintiffs' counsel. I did at times almost feel as though I'm
21 sitting in the seat of the arbiter, taking input that is meant
22 in good faith from the mental health department, and then
23 helping them see the legal standard and the deficiency of their
24 performance and ultimately their internal acknowledgment that
25 they needed to change. To change, they needed political cover,

1 and the political cover is in the form of this elected official
2 who is not listed in some of these matters.

3 So if mental health were left at its own design, I
4 think we would have five-year litigation and the crash when
5 this court determined that we had violated substantive due
6 process rights. The state's interests are best served through
7 this consent decree.

8 And then with regard to the relief to the class, as
9 Mr. DeMuro represented, we have defrauded the class as a state.
10 We have played games, a shell game, with these defendants that
11 were put in a jail system with the key locked and maybe they're
12 viewed through the keyhole, or with an open window at best, for
13 a few minutes a day. And not until the defense counsel for
14 that respective defendant would file an application with the
15 court for contempt, did the mental health department then play
16 a shell game and move them into the restorative services which
17 I found offensive, the behavior of the mental health
18 department.

19 And then we do believe that the class members are
20 treated equally as to each other because we are not
21 discriminating among and between the class members. They have
22 all been charged with a crime, they've all been judicially
23 determined to be incompetent and needing restorative services,
24 and we will fashion a plan that remedies those deficiencies.

25 **THE COURT:** And I take it the date upon which the

1 individual has been determined by the state court judge to be
2 incompetent determines the priority of placement?

3 **MR. DRUMMOND:** Yes. It will be in order as they are
4 determined. And there is -- presently now that's being
5 enforced inside the mental health department per county. So in
6 Oklahoma County, there is a list, chronological list, with the
7 objective of we treat those that have been there the longest
8 immediately.

9 **THE COURT:** You say per county?

10 **MR. DRUMMOND:** Because that's how we're -- we have a
11 database statewide, but we're ameliorating the issue on a
12 county-by-county basis. It is challenging.

13 **THE COURT:** Why wouldn't it be statewide?

14 **MR. DRUMMOND:** That's part of the plan. I'm
15 confessing how it is today.

16 **THE COURT:** All right.

17 **MR. DRUMMOND:** Today we know. We didn't know six
18 months ago. But today we know how many are in Oklahoma County
19 and the order in which and who is overseeing and where are they
20 on this path of restoration. Tulsa County similarly and other
21 counties. The plan will dictate a statewide list and the
22 priorities will be based on chronological statewide defendants.

23 So I do believe it is the request of the state that
24 this court consider the joint motion for preliminary approval
25 of the consent decree, class certification, and the plan of

1 notice to be adequate, in that we be given the opportunity to
2 present this to the contingency review board for approval and
3 then come back to this court for final approval.

4 **THE COURT:** Thank you, sir.

5 *(Discussion held off the record)*

6 **THE COURT:** For the record, let me say that subject
7 to the modification with regard to the notice on attorney fees,
8 I would be prepared to preliminarily approve this consent
9 decree but you need to satisfy my concern under the statute.
10 I'll give you some time. I think it would be best, if you
11 could, because this maras of statutes, I think, requires
12 briefing because as you said here on the record, you had not
13 been aware of my concern in this regard and it's taken some
14 studying here. There's quite a lot of material here and that's
15 what has drawn my attention.

16 So if you would file a brief in a reasonable time. How
17 much time do you need?

18 **MR. DEMURO:** Two weeks? Is that --

19 **THE COURT:** Two weeks is great. Let's see. Today
20 is --

21 **MR. DRUMMOND:** And, Your Honor, we'll join the
22 plaintiff in that brief. It will be a joint presentation.

23 **THE COURT:** Please. Today is the 15th. Two weeks
24 is the 29th, August 29th. And I will review the brief and
25 notify you as to my conclusion as to this issue that has caused

1 me to question the ability under the law to adopt the consent
2 decree. Obviously, if I agree with you all, I can
3 preliminarily approve the consent decree and I don't think we
4 need another hearing; correct?

5 **MR. DEMURO:** I think that's correct. I also think
6 that if Your Honor sees a problem, we can amend the consent
7 decree. We shouldn't let the tail wag the dog. It's one
8 provision of the consent decree that's tripping Your Honor up.

9 **THE COURT:** Correct.

10 **MR. DEMURO:** And we understand Your Honor's concern
11 to be the custody issue, inpatient verdicts outpatient for
12 people who might be dangerous, obviously a very important
13 concern. But that's one component of a big plan.

14 So we would also -- if the court is not convinced by
15 our submission, that should not prevent final preliminary --
16 excuse me -- that should not prohibit the court or prevent the
17 court to enter preliminary approval of the --

18 **THE COURT:** Of course, what it does is increase the
19 cost of the implementation of the consent decree. I'm just
20 talking practically. But if that's what's necessary under the
21 current law, that's what's necessary; right?

22 **MR. DEMURO:** Yes. And my point is, if Your Honor
23 says in your ruling, you haven't fully persuaded me and my
24 concern is X, I would ask the court to -- we'd be willing to
25 modify the consent decree to meet the court's concern so the

1 overall goal is reached.

2 **THE COURT:** Yeah. I mean, please understand me. As
3 the Attorney General has suggested, I see individuals here all
4 the time. I had an individual standing where you are yesterday
5 who I initially questioned his competency to be before the
6 court yesterday. I was satisfied.

7 But there is -- there is a spectrum -- and I think our
8 expert would agree; correct? There are various -- there are a
9 lot of different types of incompetency and my concern here is
10 really only as to the statute.

11 So if you'll get me that brief by the 29th, I'm
12 otherwise in preliminary approval of the proposed consent
13 decree with that one concern.

14 **MR. DEMURO:** Okay. So as I understand, the court's
15 current thinking is, except for that one concern, Your Honor is
16 prepared to grant preliminary approval to the consent decree
17 and appointment of class counsel and notice as modified by our
18 discussion today, except for your one caveat?

19 **THE COURT:** Yes, sir. The attorney fee and then the
20 additional notice to the OBA criminal law section -- or members
21 of the OBA criminal law section. I think you could do that
22 just by going through the OBA.

23 **MR. DEMURO:** No problem, yes. I think we
24 understand, Your Honor.

25 **THE COURT:** All right. Is there anything else we

1 need to discuss here today?

2 **MR. DRUMMOND:** Nothing further from the state.

3 **MR. DEMURO:** Nothing from the plaintiffs, Your
4 Honor.

5 **THE COURT:** All right. Thank you all very much. We
6 are adjourned.

7 *(The proceedings were concluded)*

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C E R T I F I C A T E

I, Brian P. Neil, a Certified Court Reporter for the Northern District of Oklahoma, do hereby certify that the foregoing is a true and accurate transcription of my stenographic notes and is a true record of the proceedings held in above-captioned case.

I further certify that I am not employed by or related to any party to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

In witness whereof, I have hereunto set my hand this 16th day of August 2024.

s/ Brian P. Neil

Brian P. Neil, RMR-CRR
United States Court Reporter